QUESTIONNAIRE TOPIC II: THE NEW GEOPOLITICAL DIMENSION OF THE EU COMPETITION AND TRADE POLICIES

Norway

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COMPETITION

Green competition policy

Question 1.

The Norwegian Competition Authority has not had any cases dealing with the assessment of sustainability agreements, at least not any cases known to the public. In general there has not been many infringement decisions by the Norwegian Competition Authority where the application of the Norwegian equivalent of Article 101 (3) TFEU has been important for the outcome of the case.

a.

The provision on anti-competitive agreements in the Norwegian Competition Act (section 10) is fully harmonized with article 101 TFEU and article 53 EEA. Consequently, EU case law and guidelines from the European Commission play a significant role in the application of the provision on anti-competitive agreements. Hence, the Norwegian Competition Authority (NCA hereafter) will look to the European Commission's approach in its assessment of sustainability agreements. Relating to guidance on the assessment of sustainability agreements, the NCA consider the (draft) horizontal guidelines sufficient. The authority will, however, consider measures to make the sustainability chapter more accessible, for instance using flowcharts illuminating the assessment process. Moreover, the NCA will also introduce a dedicated sustainability page on its webpage in addition to targeted outreach to businesses and business associations.

b.

In private actions courts will have full competence to apply section 10 of the Norwegian competition act and article 53 EEA (The equivalent of article 101 TEFU). Since section 10 of the Norwegian Competition Act is harmonized with Article 101 TFEU, the courts' competence and willingness to consider sustainability effects in the assessment of an agreement, will depend on to what extent article 101 TFEU allows for considering such effects in the assessment of the agreement. Since the guidelines are not binding on national courts, the courts are expected to orient themselves more towards the case law of the EU Courts, which does not provide any clear guidance on whether sustainability effects are relevant under article 101 (3), at least for 'out of market' effects (externalities). There are judgments which indicate that other effects than efficiencies and so called 'out of market' effects are relevant under article 101 (3).[4] Still, there is no precedence from the ECJ on the matter. Furthermore, there is an uncertainty related to whether the judgments indicating that

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[4] See case T-528/93, *Métropole Télévision*, ECLI:EU:T:1996:99, paragraph 118 and case T-451/08, *STIM*, ECLI:EU:T:2013:189, paragraph 49.

public policies or 'out of market' effects are relevant under Article 101 (3), actually express the correct state of law after the modernization of EU competition law.[5] Even if this case law do express the correct state of law, there is uncertainty about to what extent public policy goals and 'out of market' effects, including sustainability, may justify a restriction of competition under Article 101 third paragraph, and hence also under section 10 in the Norwegian Competition act. Based on this lack of clarity, the outcome of a court's case must be considered to be uncertain both in a private claim, and when the courts review a decision from the NCA.

Question 2.

a.

In its merger review, the NCA will assess if the mergers, acquisitions and other forms of concentrations significantly restrict competition (SIEC-test). Generally, a consumer welfare standard applies. The Norwegian merger control rules was harmonized with EU merger control in 2017. The amendment of the act introduced the SIEC-test and the consumer welfare standard as the relevant welfare standard.

This implies that a merger that satisfies the criteria for intervention in merger control, nevertheless, can be approved if the concentration leads to efficiency gains to the benefit of consumers in the relevant market.

The tools the NCA's have at its disposal to consider sustainability benefits in merger control will to some degree build on the principles envisaged in the EU (draft) horizontal guidelines relating to assessment of principles for antitrust assessment of sustainability agreements under 101 TFEU.

Thus, in a merger review, the NCA would consider claims related to sustainability benefits with a view to the principles envisaged in the (draft) guidelines. Nevertheless, the sustainability benefits will need to be substantiated and can not simply be assumed. Factors such as "Individual use value benefits", "Individual non-use value benefits", and "Collective benefits" can be considered with the appropriate methodology, with the companies involved bearing burden of proof.

However, in merger control the flexibility to consider sustainability benefits, for instance related to future customers and consumer benefits realized in other markets are wider than what is envisaged by the EU (draft guidelines) relating to agreements.

b.

Relating to detrimental effects on the environment as a consequence of a concentration, this will be considered on a case-by-case basis, and form part of one or more theories of harm. Here, environmental considerations could for instance be given relevance as a non-price dimension of competition, eg. as a dimension of product quality or innovation, in the same

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[5] For the discussion in the literature on this topic see e.g., Okeoghene Odudu, 'The Wider Concerns of Competition Law', *Oxford Journal of Legal Studies,* 30, No. 3 (2010), pp. 599-613; Okeoghene Odudu, *The Boundaries of EC Competition Law,* Oxford, 2006, pp. 159-173; Christopher Townley, *Article 81 EC and Public Policy,* Hart Publishing, 2009, Anne C. Witt, 'Public Policy Goals Under EU Competition Law – Now is the Time to Set the House in Order', *European Competition Journal,* 8, No. 3 (2012), pp. 443-471; Martin Gassler, 'Sustainability, the Green Deal and Article 101 TFEU: Where We Are and Where We Could Go' *Journal of European Competition Law & Practice,* 12, No. 6 (2021), pp. 430-442.

way as the assessment relating to reduction in quality of privacy or data protection. Thus, the NCA might, *pari passu*, consider that a concentration satisfies the criterion for intervention if it reduces the environmental quality of the products or degrade innovation for green products.

Question 3.

As alluded to above, sustainability benefits can be incorporated into the NCA's competition law analysis. The NCA can weigh relevant consumer benefits against competition concerns, both in merger review as well as in the assessment of environmental agreements potentially restricting competition by effect or object. The trade-off between harm to competition and benefits to sustainability will be determined according to the EU (draft) horizontal guidelines and the criteria for assessing benefits under Article 101(3) TFEU.

European strategic autonomy, the promotion of "European champions" and competition law enforcement

Question 4.
a.
The NCA did follow the debate relating to the Siemens/Alstom transaction closely and expressed its view in general terms in the form of an op ed written by the former Director general Lars Sørgard on June 26, 2019, warning against a more lax merger control based on arguments supporting the creation national champions.[6]

c.
Information on to what extent the NCA has been confronted with similar arguments in comparable transactions is not available. Regardless, the transaction would be assessed based on the criteria in the competition law, where public interest or industrial policy aspects are not part of the assessment. The harmonization of the Norwegian merger control with EU merger control implies that the European Commission's decisional practice and guidelines is relevant for the application of the Norwegian merger control. The Norwegian Competition Authority often refers to and base their analysis on the guidelines and the decisional practice from the European Commission. Consequently, the *Siemens/Alstom* case may possibly influence how industrial policy arguments will be dealt with by the Norwegian Competition authority.

Question 5.

In merger review, the NCA will assess the transaction only according to the effects on competition and consumers. As mentioned above, the harmonization of national merger control with the EU merger control rules, implies that the NCA is expected to follow the approach of the EU in *Siemens/Alstom* regarding industrial policy issues.

Question 6.

Up until the amendment of the merger control rules which entered into force on 1st January 2017 the Government could assess the merger according to public interest considerations. The former Section 21 of the competition act provided that: "*In cases involving questions of principle or interests of major significance to society, the King in Council [the Government]*

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[6] see https://konkurransetilsynet.no/kronikk-konkurranse-hjemme-gir-konkurransekraft-ute/ in Norwegian

may approve a concentration or an acquisition of shares that the Competition Authority has intervened against under Section 16 and Section 16 a. Such approval may be conditional.". The main purpose of the amendment of the act was to achieve a more independent enforcement of the competition act, and in particular the merger control. This amendment occurred together with the establishment of an independent appeals tribunal in competition cases. For merger cases this involved that the competence to review the NCAs merger decisions was moved from the Ministry of Trade to the Competition Appeals Tribunal.

As a consequence of this amendment there are no recent cases where a decision by the competition authorities has been reversed based on industrial policy grounds or other public policy grounds. Furthermore, the merger decision review of the Ministry in the latest years before the amendment was based on effects on competition and consumers.

Question 7.

The Norwegian competition authority has not brought any cases against any of the large US digital platforms.

In theory the Digital Markets Act should not affect the Norwegian Competition Authority's ability to bring its own cases against large digital platforms, since it "should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct".[7] There are particularly two reasons why the Norwegian Competition Authority is not expected to bring cases against large digital platforms. Firstly, as mentioned above, the Norwegian Competition Authority has not previously been active in enforcing national competition rules against the large international digital platforms. Secondly the Norwegian Competition Authority does not have any competence to enforce Article 101 or 102 TFEU, its cases would only regard a violation of EEA law or national competition law, while any competition law violation by these platforms are expected to be a violation of EU competition law. Thirdly, the Norwegian Competition Authority has previously considered the European Commission to be the most suited body to take actions against the large digital platforms, such as in the case regarding the online hotel booking platforms and the practice of price parity clauses.

On the question of whether it is useful for NCAs to pursue their own cases against large digital platforms, the answer will depend on the effect that the DMA has both on the large undertakings in the digital markets, and how the enforcement of the DMA will affect the European Commissions future enforcement of the competition rules, in particular article 102 TFEU.

Question 8.

In our opinion, there does not appear to be any support in economic theory that the creation of national champions based on aid and not on the merits of the company, will improve economic efficiency in the EU and EEA.

Question 9.

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[7] Draft Digital Markets Act, preamble paragraph 10.

Regulation 2015/1589 has not been incorporated to the EEA agreement. The rules on enforcement of State Aid rules within the EFTA pillar of the EEA agreement does not contain a provision similar to that of article 29(1) of regulation 2015/1589.

Geopolitical instruments, trade defence instruments, and competition policy

Question 10

There have not been any decisions where the Competition Authority's analysis of competition has been affected by trade defense measures towards non-EU-countries.

TRADE

FDI control

The FDI Screening Regulation establishes the framework for FDI control at Member State level. Whilst the control of FDI falls within the common commercial policy, Member States play a significant role due to their competence for public order and security. Overall, the regulation seeks to find a balance between respecting Member States' competences and ensuring sufficient EU control as well as cooperation between the Member States.

Question 11

Please identify and describe the main national legal instruments that have been introduced in the context of the application of the FDI Screening Regulation at national level.

As the EU`s trade policy is not covered by the EEA agreement, Norway is not subject to the EU FDI Screening Regulation (2019/452). Norwegian authorities have nevertheless referred to the FDI Screening Regulations on several occasions and have expressed an intent to cooperate closely with the EU in such matters.[8]

Norway established screening regulations for foreign direct investments in 2019, in the revised Security Act, chapter 10. The screening regulations in chapter 10 consist of three relatively short sections, respectively §§ 10-1 (Notification obligation for acquisition of businesses subject to the Security Act), 10-2 (Processing of notification of acquisitions) and 10-3 (Decision on suspension of acquisition of businesses). The two latter provisions are primarily procedural provisions. § 10-3 states that the King can issue further regulations regarding the notification obligation. The only regulatory provision that has so far been issued on this matter, is § 93 of the Security of Undertakings Regulations which entered into force in 2019.[9] It states what information the acquirer must provide in its notification to the responsible Ministry, alternatively to the Norwegian National Security Authority (NSM). The information requested is among others, ownership structure and annual turnover etc.

The FDI screening regulations in the Security Act chapter 10 only applies to acquisitions of companies which are subject to the Security Act. There is no publicly available information about which companies are subject to this act. However, the companies must fulfill at least

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[8] The Norwegian Justice Ministry, *Consultation paper on changes in the Security Act (screening etc),* page 6: https://www.regjeringen.no/contentassets/f521121e63a642f797f5c577742ed605/horingsnotat-om-endringer-i-sikkerhetsloven-eierskapskontroll-mv..pdf

[9] The Security of Undertakings Regulations, 20.12.2018: https://lovdata.no/dokument/SFE/forskrift/2018-12-20-2053

one of the following criteria stated in the Security Act § 3-1 in order to be subjected to the Act:

(a) process security-graded information,
(b) possess information, information systems, objects or infrastructure that are of decisive importance for fundamental national functions or
(c) conduct activities that are decisive for fundamental national functions.

The responsible ministries are responsible for identifying companies which constitute or conduct activities that are decisive for fundamental national functions.[10]

As of today, the only regulation which can be applied to stop or restrict foreign investments in businesses that are not subject to the Security Act, is § 2-5 in the Security Act.[11] However, this is a narrow exception provision which can be used when there is no other legal basis for stopping an activity that entails a risk to national security interests being threatened. The provision gives the King in Council the powers to make necessary decisions to prevent activities which present a threat to security or other planned or ongoing activities which may present a not insignificant risk of a threat to national security interests. The scope of the provision is wide and covers a broad spectrum of activities and situations. However, these are not specified in relation to which transactions or which sectors are covered.

Norwegian authorities have also emphasized the use of the Security Act § 9-4, for example in cases where ownership changes occur in a company´s supply chain that comprises a risk to national security. Regardless of whether the procurement is classified or not (the former is a procurement where the supplier of the good or service may gain access to or produces classified information or may gain access to a critical national object or infrastructure), the provision in the Security Act § 9-4 can be applied. The provision gives the government the opportunity to stop or set conditions for the procurement.

In October 2021 the Norwegian Justice Ministry in cooperation with the Defense Ministry, presented a consultation paper where several changes to the screening regulations of the Security Act were suggested.[12] The Ministries are still working on the matter, and have so far not presented any conclusions.

a. *What are the main challenges in applying FDI control at Member State level? Please explain by reference to concrete examples based on available practice in your Member State jurisdiction.*

Even though Norway introduced screening regulations in 2019, there is little known practice related to the provisions of the Security Act. As such cases involve both confidential business

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[10] Proposition to the Storting (153L – 2016/2017), page 111: https://www.regjeringen.no/contentassets/0fcee45affd24280896b88b5413a00aa/no/pdfs/prp201620170153000dddpdfs.pdf

[11] The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions*, page 15: https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20å%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjøp%200621.pdf.

[12] The Norwegian Justice Ministry, *Consultation paper on changes in the Security Act (screening etc)*: https://www.regjeringen.no/contentassets/f521121e63a642f797f5c577742ed605/horingsnotat-om-endringer-i-sikkerhetsloven-eierskapskontroll-mv..pdf

information and national security issues, it is understandable that detailed practices are not made available to the public. The NSM has published a short guide, referred to as "*Guide in the use of the Security Act to counter security-threatening investments and acquisitions*".[13] However, this information is of limited nature and does not provide clarifications regarding specific transactions or sectors which are covered by the FDI screening regulations.

The only publicly known case related to a foreign direct investment of a Norwegian company, which was considered to pose a threat to national security, is the Russian attempt to acquire Bergen Engines in 2021. The Russian TMH International Group attempted to buy the company, which amongst other produce engines to the Norwegian Navy.[14] The acquisition was considered a threat to national security and was eventually stopped by Norwegian authorities based on § 2-5 (the provision considered to be a security valve in cases where no other provisions are applicable) of the Security Act. The ordinary screening regulations in chapter 10 did not apply to the case, as Bergen Engines was not subject to the Security Act.[15]

One of the main challenges in the Norwegian screening system today, is the fact that chapter 10 of the Security Act only applies to Norwegian companies which are subject to this act. This represents two challenges: First, it is not publicly known which companies these are. This makes it more challenging for foreign investors to know whether the transaction they are about to undertake is subject to national screening regulations or not. Furthermore, there is ambiguity pertaining to which acquisitions and transactions are covered by the screening regulations. Two, acquisitions and transactions related to companies which are not subject to the Security Act, are not subject to any regular notification or reporting procedures. Consequently, these activities are not systematically reported to Norwegian authorities.

A further challenge relates to which Norwegian authorities receive notifications from investors and assess them. A fixed point of contact for notifications has not been established due to the sector principle of the Security act. The foreign investor must therefore contact the ministry responsible for the "business sector" in which the target company is located. If no ministry is responsible for the target company in question, the investor must contact and notify the NSM. NSM is one of Norway's three secret services. As a result, Norwegian authorities have not established a separate institution with high competence and experience in screening, instead the competence is distributed among several ministries and NSM.

Under the currently applicable laws and available practice of the Member State:

b. *Is the FDI Screening Regulation directly applied or do Member State rules go beyond the harmonisation achieved by that regulation (in terms of scope and/or the strictness of the control)?*

As mentioned, the FDI Screening Regulations do not pertain to Norway as an EEA member. The Norwegian national screening regulations in the Security Act are applied in cases where

[13] The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions*: https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20å%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjøp%200621.pdf

[14] Rolls Royce: https://www.rolls-royce.com/media/press-releases/2021/04-02-2021-rr-signs-agreement-to-sell-bergen-engines-to-tmh-group.aspx

[15] Royal decree of 26. March 2021, " *Prohibition of the sale of Bergen Engines AS*": https://www.regjeringen.no/contentassets/e775dc91a33e4713a090da7398e6f3f5/endelig-godkjent-kgl.res.-stans-av-salget-av-bergen-engines-as.pdf

investors acquire Norwegian companies subject to this Act. As it is not publicly known how many companies are subject to the act in Norway, it is challenging to estimate the exact scope of the screening regulations in chapter 10 of the Security Act. Acquisitions and transactions by foreign investors related to Norwegian companies which are not subject to the Security act, are currently not subject to reporting obligations to Norwegian authorities.

c. What investments and investors are subject to FDI control?

According to the Security Act § 10-1, all acquisitions of a qualified ownership interest in a company which is subject to the act, are covered by FDI control.

The acquirer shall notify the responsible ministry about the acquisition. Which Ministry must be notified by the acquirer depends on which company is to be acquired. Different ministries are responsible for different "business" sectors. If the target company is not covered by any ministry, the acquirer shall notify the NSM.

Section 10-1 states that a qualified ownership interest exists if the acquirer will, overall, give the acquirer either directly or indirectly;

- At least one-third of the share capital, participating interests or votes in the undertaking,
- the right to own at least one-third of the share capital or participating interests, or
- significant influence over the management of the company otherwise.

This does not include the obligation to report, for example, in the case of sale of assets or the transfer of rights and obligations. If the ministry is made aware of such cases, they may be stopped due to national security if the conditions of section 2-5 in the Security act are met.[16]

According to the screening regulations in chapter 10 of the Security Act, the investor (acquirer) can be foreign, including a EU member, or Norwegian. The broad scope was justified by the fact that ownership structures can be complicated, and by imposing a notification obligation on all acquirers, you also cover cases where a foreign investor seek to circumvent the national screening provisions. [17]

d. What sectors are subject to FDI control?

The Norwegian screening regulations of the National Security Act do not stipulate or identify any specific sectors which are covered by the regulations. However, the regulations of chapter 10 apply to all companies which are subject to the act. In § 1-3 the criteria for being covered by the act is defined as follows:

[16] The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions, page 11*: https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20å%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjøp%200621.pdf

[17] Proposition to the Storting (153L – 2016/2017), page 150: https://www.regjeringen.no/contentassets/0fcee45affd24280896b88b5413a00aa/no/pdfs/prp201620170153000dddpdfs.pdf

Businesses that:

(a) process security-graded information,
(b) possess information, information systems, objects or infrastructure that are of decisive importance for fundamental national functions or
(c) conduct activities that are decisive for fundamental national functions.

The responsible ministries are responsible for identifying companies which constitute or conduct activities that are decisive for fundamental national functions.

e. *How is a risk to public order or security assessed at Member State level?*

The authorities' processing of notices of acquisition is regulated in the Security Act § 10-2. The Ministry which receives the notification, alternatively the NSM, will seek advice from relevant Norwegian authorities. This includes advisory opinions from relevant Ministries and Norwegian intelligence- and secret services on the acquisition´s and the investor´s risk potential. A risk assessment will be carried out, and if they conclude that the acquisition poses a not inconsiderable risk based on the target company`s importance for safeguarding national security interests, a decision to stop or impose conditions on the acquisition can be made by the King in Council.[18]

Hence, the King in Council has the option to stop or set conditions for the purchase of a qualified share in a company that is subject to the Security Act if there is a not insignificant risk that national security interests are threatened, cf. Security Act section 10-3. This also applies if an agreement has already been entered into regarding the acquisition, and even if the ministry has not received notification of the acquisition as expected.

f. *Is there room for competition considerations in the FDI control, for example, could it be relevant to argue that the target would become a more effective competitor if it were acquired by the foreign firm which is willing to significantly invest in the target?*

There is nothing in the preparatory work of the Security Act or in NSM's guide that indicates that Norwegian authorities can or will take competition considerations into account when conducting FDI control according to the Security Act.

g. *Do the information-sharing mechanisms between the Commission and the Member States operate effectively and adequately?*

h. *What legal remedies are available to contest national authorities' FDI decisions?*

The preparatory work of the Security Act and the Security Act do not mention what legal remedies are available to contest Norwegian authorities FDI decisions. Hence, it is assumed that such decisions, made by the King in Council, can be appealed to a Norwegian court.

i. *Has the COVID-19 pandemic affected the application of FDI control?*

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[18] The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions*, page 14: https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20å%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjøp%200621.pdf

Mandatory due diligence and regulating supply chains

Question 14.

In January 2022 the 'Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions' entered into force. This act establishes some due diligence obligations on businesses related to fundamental human rights and decent working conditions, but not related to environmental law. In the proposal of the act, it is suggested to await the legislative work in the EU regarding sustainable corporate governance, and potentially revise the act when that procedure is finalized.

a. *Which companies are subject to this obligation/legislation?*

According to section 3 of the act, the companies that are subject to the obligations are 'larger enterprises', meaning either companies subject to some specific thresholds in the accounting act, or companies that exceeds two or more of the following conditions: sales revenues above 70 MNOK; a balance sheet total above 35 MNOK; average number of employees in the financial year above 50 full time positions.

b. *Which obligations must companies respect?*

According to section 4 of the act, the companies have to carry out due diligence in accordance with the OECD Guidelines for Multinational Enterprises, which includes to identify and assess actual and potential adverse impacts in fundamental human rights and decent working conditions that the enterprise has either caused or contributed toward, or that are directly linked with the enterprise's operations, products or services via the supply chain or business partners. Furthermore, the companies have to implement suitable measures to cease, prevent, or mitigate adverse impacts om fundamental human rights and decent working conditions.

Pursuant to section 5 of the act, the companies or enterprises shall publish an account of due diligence pursuant to section 4, and anyone who requests it in writing has the right to information from the enterprise regarding how the enterprise address actual and potential adverse impacts on fundamental human rights or decent working conditions.

c. *Can companies be held responsible for actions of other companies/individuals under their control and/or along the supply chain? If so, under what conditions?*

Pursuant to section 3 of the act, parent companies will be responsible for the activity of their subsidiaries. This is not clear from reading the actual wording of the provision, but it follows from the preparatory works.

The obligations described under (b) above, includes identifying and assessing impacts on fundamental rights and decent working conditions in the supply chain or with business partners. The duty is limited to what information the company or enterprise are allowed to request from its suppliers and business partners.

d. *Does the duty of care/due diligence obligation have extra-territorial effects?*

The due diligence obligation applies to all large enterprises (see answer to letter a for the definition of large enterprises) which are resident in Norway and foreign enterprises that offer goods and services in Norway and that are liable to tax in Norway.

e. *What are the available remedies and to whom are those remedies available?*

Pursuant to section 11 of the act the Norwegian Consumer Authority may issue individual decisions to order companies to comply with the due diligence duty, impose enforcement penalties either as a running charge or as a lump sum, and impose infringement penalties in case of repeated infringements.